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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Processing Order for Applications Filed Pursuant to the Commission's New Local Broadcast Ownership Rules	)	FCC 99-240 (Public Notice)
	)	
Review of the Commission's Regulations Governing Television Broadcasting; Television satellite Stations Review of Policy and Rules	)	MM Docket Nos. 91-222 and 87-8

To: The Commission

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ("PCC") by its attorneys files these comments in response to the Commission's Public Notice FCC 99-240, released September 9, 1999 ("*Public Notice*") and also published in summary form in the *Federal Register* on September 17, 1999,[1] requesting supplemental comments by today's date on the *Report and Order* in the above-referenced proceeding regarding local broadcast ownership.[2] Specifically, the Commission has requested comments regarding the order in which it should process applications "filed the same day relating to stations in the same market" and which, because of

1 *See* 64 Fed. Reg. 50,668 (FCC) (Sept. 17, 1999).

2 *See Report and Order* in MM Docket Nos. 91-221 & 87-8, FCC-209 (adopted August 5, 1999) ("*TV Local Ownership Order*").

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the Commission's new "voice count" rules, might not all be eligible for grant.[3] The Commission proposes to resolve such conflicts by use of random selection.[4] PCC strongly disagrees with the Commission's random selection proposal, particularly in the "TV duopoly" context where such conflicts are most likely to arise because of the arbitrary minimum "8 TV voice" standard that the Commission has established.[5] As explained more fully below, PCC urges the Commission to adopt an alternative approach which takes into account an applicant's pre-existing interest in a station in the market as demonstrated by its time brokerage agreement (local marketing agreement or "LMA") for that station. This method entails application of a substantive criterion which renders it fair and rational, easily administered, and fully consistent with the public position of Chairman Kennard to eliminate television LMAs and transform them into duopolies consistent with the Commission's new ownership rules.

PCC agrees with the Commission that a purely "first-come, first-served" approach to resolving local broadcast application conflicts is not appropriate. By necessitating a system whereby applications would have to be date-stamped with the exact time of receipt, down to the second, such an approach would foster a race to line up at the Commission's door with application in hand in order to beat the potential competition for a similar ownership combination in the same market. PCC can imagine that parties might even begin sending their representatives to stand in line the night before the morning of the filing date – much as fans of a rock music group camp out the night before to purchase their tickets for an expected "sell-out"

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3 *See Public Notice* at 1 (citing *TV Local Ownership Order*, ¶ 150). *See also TV Local Ownership Order*, ¶¶ 64-70 (8 TV voice standard for duopolies) and ¶¶ 100-114 (one-to-a-market voice tests).

4 *Public Notice* at 2.

5 *See TV Local Ownership Order,* ¶¶ 64-70.

performance. Surely this theatrical and possibly chaotic outcome is undesirable, and moreover, completely unnecessary. Yet, the Commission's proposed random selection approach is equally unnecessary and unfitting.

As a threshold matter, PCC believes that the "8 TV voice" standard is itself arbitrary and unfair, primarily because it fails to take into account other media outlets, such as radio broadcast, cable television, newspapers, and the internet, which clearly contribute to diversity of media voices in any market – a phenomenon which the Commission recognizes and considers (with the exception of the internet) in the context of radio-television cross ownership.[6]

While a full discussion of the problems with this discrepancy in approach to the TV duopoly scenario as compared to the radio-television cross ownership situation is beyond the scope of these comments which, per the Commission's Public Notice, are to be limited to the issue of application processing order, PCC submits that the voice test for television duopolies must include, in addition to the internet, the following:

> (1) all independently owned and operating full-power commercial and noncommercial broadcast television stations licensed to a community in the DMA in which the television station's community of license is located;
>
> (2) all independently owned and operating commercial and noncommercial broadcast radio stations licensed to a community within the radio metro market in which the television station's community of license is located, as well as broadcast radio stations located outside the radio metro market that have a reportable share in the metro market according to Arbitron or another nationally-recognized audience rating service. In areas that are not classified as a radio metro market, the radio stations located in an area that would be the "functional equivalent" of a radio market should be counted;
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> (3) all independently owned daily newspapers published in the DMA that have a circulation exceeding five percent of the households in the DMA , with "daily newspapers" defined as English language newspapers published four or more days per week; and

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[6] *See TV Local Ownership Order*, ¶ 111.

(4) cable systems where cable service generally is available to television households in the DMA.[7]

PCC believes that it is impractical for the Commission to try to settle on an approach to processing order until the Commission has reconsidered the 8 TV voice test established in the *Report and Order* and develops a test that is more sensible and consistent with the Commission's public interest goals. PCC is also compelled to point out that if the 8 TV voice standard were to be modified (for example, to take into account all of the other media outlets in the market, as PCC believes it should), the Commission likely would have far fewer (and possibly no) TV duopoly application conflicts to resolve in the first place, and the processing order for such applications would be of limited import. Indeed, the question of processing order might not arise at all.[8]

If the Commission insists on resolving immediately, at least on an interim basis, the "merits" of the random selection proposal, PCC believes that, although this method would be relatively easy to administer, it is not as fair as meets the eye, nor is it clearly consistent with Section 309(i) of the Communications Act, as amended ("*Act*"),[9] contrary to the Commission's assertions.[10] Because of the voice counts that have been established under the Commission's new local ownership rules, few if any parties are likely to file applications for TV duopoly or radio-television ownership combinations unless they meet all of the Commission's other criteria

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7 *See id.*

8 Notably, moreover, the 8 TV voice standard is contrary to the Commission's own statement that the "new rules . . . reflect a recognition of the growth in the number and <u>variety</u> of media outlets in local markets." *Id.* ¶ 1 (emphasis added).

9 *See* 47 U.S.C. § 309(i).

10 *See Public Notice*, at 2.

(*i.e.*, other than the "voice" criterion) for such ownership. This means that most if not all applications filed on a given day for a particular market will likely be equally meritorious in terms of compliance with the Commission's non-voice criteria. If so, then in instances in which a particular market is relatively smaller, the grant of a single TV duopoly (or a single radio-television) combination will eliminate the chance for any other applicant to own a similar combination in that market. In the Commission's own words, "[t]he order in which applications are processed would then be <u>determinative</u> in these situations."[11] As a result, the random selection of a particular application for grant will be tantamount to the issuance of a license or permit "using a system of random selection . . . after July 1, 1997" which, as the Commission recognizes, is expressly prohibited under Section 309(i).[12]

In contrast, an approach which takes into account an applicant's existing LMA for the television station proposed to be acquired in either the TV duopoly or radio-television combination presents no such issue under the Act and introduces a substantive component missing from the Commission's random selection proposal.[13] Using an LMA-based method, the Commission would examine all applications received on a given day (as it would under its own random selection proposal) to determine whether they meet the non-voice criteria for granting, for example, a TV duopoly in a particular market. If all applications meeting such criteria could not be granted because of the minimum voice standard -- whatever that may be, then, under

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11 *See id.* at 1 (emphasis added)

12 *See Public Notice* at 2 (quoting 47 U.S.C. § 309(i)(5), "the Commission shall not issue any license or permit using a system of random selection under this subsection after July 1, 1997").

13 PCC does not assert, however, that adoption of its suggested LMA-based approach rectifies or eliminates the inherent unfairness and arbitrariness of the 8 TV voice standard – an issue on which it reserves the right to comment further in another forum.

PCC's proposal, the Commission would further consider only the application where the applicant already has an LMA for the television station it proposes to now own. In the event that more than one such LMA-based application is submitted, the Commission could evaluate each such application to determine whether there are public interest benefits to be gained by allowing the proposed ownership combination. PCC believes that any and all such LMA-based applications that demonstrate public interest benefits should be granted by the Commission. PCC recognizes that this would necessarily entail waiver of the established minimum voice standard on a case-by-case basis, but a policy that permits waivers in certain circumstances in order to serve the public interest is clearly within the scope of the Commission's authority and is contemplated by the Commission in implementing its new rules.[14] Moreover, a case-by-case analysis of such LMA-based applications still would be relatively easy to administer, and the number of potential applications falling into this category would be finite. Alternatively, the Commission could give priority to the applicant with an LMA of longest duration.

Using LMAs as "tie-breakers" -- or at least to narrow the pool of applications to be evaluated for grant under a waiver policy -- makes sense because broadcasters typically have opted for LMAs based on a strong interest in a particular market and/or station. Of course the licensee of a brokered station ultimately controls that station. However, it is a fact that most television LMA programmers make a substantial commitment to the success of the brokered station because station operations directly affect the programmer's own viability, which in turn,

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14 *See, e.g.*, *TV Local Ownership Order*, ¶¶ 73, 79 (discussing waiver policy for failed or failing stations in the context of the television duopoly rule), and ¶ 121 (noting in the context of the radio-television cross-ownership rule that, "[i]n the event that extraordinary evidence exists that a waiver of our revised rule is warranted, the Commission will consider that evidence pursuant to our general waiver authority" (citing *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1-27 (1972)).

if positive, enables the programmer to provide improved service to the public. A long-standing LMA especially demonstrates a strong commitment not only to the market but to that particular station and its viewers in the served community. This demonstrated service commitment ought to be acknowledged by the Commission and factored into the decision regarding the order in which conflicting local ownership applications are processed.

An LMA-based approach, which may in some circumstances entail the use of waivers as noted above, has the added advantage that it will likely eliminate much more quickly many television LMAs throughout the country, thus serving a clearly stated goal of the Commission. The Commission has determined to make attributable those television LMAs under which the programmer provides more than 15% of the programming and to "grandfather" television LMAs entered into prior to November 5, 1996 until the Commission's biennial review in 2004.[15] The Commission's new rules reflect its uneasiness and suspicion regarding television LMAs. As the Commission noted in its *Attribution Report and Order*, the LMA attribution rule has been adopted "to prevent the use of [LMAs] to circumvent . . . ownership limits," as the Commission believes that "television LMAs . . . may give the brokering station influence over the programming of the brokered station such as should be recognized as an attributable relationship."[16] The new rule thus addresses the Commission's concern that "substantial [LMAs] among stations serving the same market, combined with the increased common

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15 *See Report and Order, In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy,* MM Docket Nos. 94-150, 92-51, & 87-154, FCC 99-207 (adopted August 5, 1999) ("*Attribution Report and Order*"), ¶ 83; *TV Local Ownership Order*, ¶¶ 142-148.

16 *See Attribution Report and Order*, ¶¶ 83, 87.

ownership permitted by the revised local rules, could undermine broadcast competition and diversity."[17]

Commission Chairman Kennard has been even more explicit, characterizing "questions concerning the responsibility and accountability of the actual licensee of a [brokered] station" as "problems" that he hopes "will fade away because LMAs will be converted into duopolies."[18] As he stated the day the new rules were announced on August 5, 1999,

> . . . I think we need to consider more broadly the role of LMAs in broadcasting. While they have no doubt produced some benefit, they represent a kind of artifice. I believe we need to consider whether the benefits of LMAs could be attained through other arrangements, such as actual joint ownership, that do not raise questions concerning the responsibility and accountability of the actual licensee of a station.[19]

It is probably safe to assume that many broadcasters who are party to LMAs will attempt to acquire the television stations they now merely time-broker by applying for duopoly or radio-television combinations permitted under the new rules. By adopting a processing order that factors an LMA into the evaluation of a duopoly or radio-television ownership proposal, the Commission can reasonably expect to eliminate LMAs even sooner and more efficiently. Applying a waiver policy, as described above, would likely result in even more LMAs being eliminated in the near future. Under the alternative approach of giving priority to the "older" LMAs (*i.e.*, those of longest duration), the Commission at least could reasonably expect to eliminate many grandfathered LMAs well before the planned case-by-case review of them in the

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17 *See id.*, ¶ 84.

18 *Id., Separate Statement of Chairman William E. Kennard. See also id., Statement of Commissioner Gloria Tristani on Broadcast Ownership* (associating television LMAs with "subterfuge" and indicating her hope and expectation that television LMAs will suffer a "sharp drop" in light of the new rules).

19 *See id., Separate Statement of Chairman William E. Kennard.*

year 2004 as part of the Commission's biennial review process. The Commission would thus significantly diminish the administrative burden that might otherwise exist at the time of biennial review.

PCC hopes the Commission will defer its decision regarding processing order until the 8 TV voice standard is revisited and finally resolved. As stated above, if the Commission nevertheless insists on immediate action with respect to processing order, PCC hopes the Commission will act in the best interest of the public-- as it is required to do-- by rejecting its proposed random selection method and adopting instead a rational and fair method of dealing with conflicting applications in the TV duopoly and radio-television ownership contexts. An LMA-based approach is such a method. It offers an easily administered test that is substantive -- rather than leaving everything to chance -- and which accomplishes the Commission's related goal of addressing television LMAs to bring them into compliance with the new attribution rules. PCC therefore urges the Commission to adopt this proposal.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

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October 4, 1999

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the attached "Comments of Paxson Communications Corporation" was hand-delivered this 4th day of October, 1999, to each of the following:

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